IN THE

Supreme Court of the United States

IN THE MATTER OF ALBERT NEWTON MOORE, AN INFANT, BY NEXT FRIEND.

[Original Proceeding No. 171.]

The answer of David P. Dyer, Judge of the District Court of the United States in and for the Eastern Division of the Eastern Judicial District of Missouri, and holding the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, to the rule upon him to show cause why a mandamus should not issue commanding him in said court to remand the cause of Albert Newton Moore, an infant, by George Safford, his next friend, plaintiff, vs. Louisville & Nashville Railroad Company, defendant, to the Circuit Court of the City of St. Louis, State of Missouri.

Respondent respectfully answers and certifies to the Honorable Supreme Court of the United States:

1. That the petitioner has correctly set out the matters appearing of record in the proceedings in the said suit of Albert Newton Moore, an infant, by George Safford, his next friend, plaintiff, vs. Louisville & Nashville Railroad Company, defendant.

2. That respondent overruled plaintiff's motion to remand the above cause, which motion was filed in the Circuit Court of the United States on October 26, 1907, and

which motion was based on the fact that Albert Newton Moore was not a resident of the District, for the reason that, in the opinion of respondent, plaintiff had waived his privilege to have the cause remanded, by having voluntarily appeared and filed, long prior to the filing of his motion to remand, an amended petition in the Circuit Court of the United States, alleging grounds of negligence in addition to those alleged in plaintiff's petition filed in the Circuit Court of the City of St. Louis, Missouri; by stipulating with defendant in the Circuit Court of the United States for time in which defendant might plead, and by twice stipulating with defendant in the Circuit Court of the United States when the cause was there set for trial, for the continuance of said cause.

3. That respondent overruled plaintiff's motion to reconsider the ruling on said motion to remand, which motion to reconsider was filed on November 19, 1907, and which motion was based on the alleged inability of Albert Newton Moore, an infant, or of George Safford, his next friend, for him, to waive jurisdiction, for the reason that, in the opinion of respondent, George Safford, as such next friend, could waive the privilege of having the case remanded, and had waived it, as aforesaid, and for the further reason that George Safford, the next friend appointed to institute and prosecute the suit, was a citizen and resident of Missouri and it was not shown that he was not a resident of the District of the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. George Safford, whose residence, rather than that of Albert Newton Moore, controls, being appointed as next friend for Albert Newton Moore to institute and commence suit, and being a citizen and resident of Missouri, and being possibly a resident of the District, and the removing defendant being incorporated under the laws of Kentucky, the Circuit Court of the United States seemed, in the opin-

ion of respondent, to have full authority to hear and determine the cause.

4. That the foregoing rulings on said motions were made in the exercise of the authority vested in respondent by law, and respondent did not, in making said rulings, abuse the discretion reposed in him; that said rulings if erroneous are properly reviewable by writ of error and not by mandamus.

5. That respondent is advised that it is not necessary for him to make any further or other answer to the rule aforesaid, than is herein contained, nor more specifically to any of the allegations set forth in the petition for mandamus aforesaid, and, having fully answered said rule, he prays to be hence discharged with all proper costs.

And these are the causes and reasons which this respondent offers why a mandamus should not issue commanding him to remand said cause to the Circuit Court of the City of St. Louis, Missouri. But he respectfully submits to the judgment of the court, and will enforce or order any direction given by the court in the premises.

Respondent respectfully refers to the brief of P. Taylor Bryan, Harvey L. Christie and Harold R. Small, counsel, filed in this honorable court, and to the authorities referred to therein, in support and maintenance of the positions assumed by this answer.

DAVID P. DYER,

Judge of the District Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri, holding the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri.

STATEMENT.

On November 16, 1906, a petition was presented to the Circuit Court of the City of St. Louis, Missouri, praying the appointment of George Safford as next friend for Albert Newton Moore, an infant over the age of fourteen years, for the purpose of instituting and prosecuting a suit in that court against the Louisville and Nashville Railroad Company to recover twenty thousand dollars damages for personal injuries received by Albert Newton Moore by reason of the alleged negligence and carelessness of the Louisville and Nashville Railroad Company in the operation of a certain locomotive and train of cars in the city of Mount Vernon, Illinois, on November 10, 1905. The petition alleged that Albert Newton Moore had no legally appointed guardian. George Safford, in the same instrument, consented to act as next friend. The court thereupon ordered the appointment of George Safford to act as next friend for Albert Newton Moore. Afterwards, on the same day, suit was instituted in the Circuit Court of the City of St. Louis, Missouri, returnable to the December term, 1906, thereof, by the filing of a petition entitled Albert Newton Moore, by George Safford, next friend, plaintiff, vs. Louisville & Nashville Railroad Company, defendant. In due time, on December 5, 1907, defendant presented its petition for removal, with bond, alleging Albert Newton Moore to be a resident and citizen of Illinois, George Safford, next friend, to be a resident and citizen of Missouri, and defendant Louisville and Nashville Railroad Company to be a cor-

poration duly incorporated under the laws of Kentucky, and that the recovery sought by plaintiff was twenty thousand dollars. Having heard and duly considered the petition, the court approved the bond and ordered the certification of a transcript of the record to the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. On January 31, 1907, the transcript was filed in the Circuit Court of the United States for the Eastern Division of the Eastern Judicial District of Missouri. **On March 22, 1907, an amended petition was filed by plaintiff in the Circuit Court of the United States alleging new grounds of negligence.** On March 25, 1907, a stipulation of the parties to the suit was filed permitting defendant to plead on or before March 30, 1907; and on March 30, 1907, defendant filed a motion to strike out plaintiff's amended petition and on the same day filed a motion to make plaintiff's amended petition more definite and certain. On May 20, 1907, a stipulation of the parties was filed continuing the cause which was set for trial on that day. On October 8, 1907, the cause, having been again set for trial, was again continued on the stipulation of the parties. On October 26, 1907, plaintiff filed his motion to remand the cause to the Circuit Court of the City of St. Louis, Missouri, on the ground that the Circuit Court of the United States was without jurisdiction, which motion, having been submitted upon briefs on November 2, 1907, was on November 12, 1907, after having been fully considered, overruled, the court holding the right to remand to have been waived by the general appearance of both plaintiff and defendant in the Circuit Court of the United States. On November 19, 1907, plaintiff filed a motion to reconsider the ruling made on November 12, 1907, on the motion to re-

mand, on the ground that Albert Newton Moore, being an infant, jurisdiction could not be waived by him or by his next friend, George Safford, for him. This motion was overruled for the reason that, in the opinion of the Circuit Court of the United States, George Safford, as next friend, was empowered to waive the privilege of objecting to the jurisdiction of the court where the objection was based on the fact that Albert Newton Moore was not a resident of the District. Moreover, in the opinion of the Circuit Court, as appears by the return herein, George Safford, the next friend appointed by the Circuit Court of the City of St. Louis, Missouri, to institute and prosecute the suit for Albert Newton Moore, was a citizen and resident of Missouri, and as it was not shown that he was not a resident of the District, the respondent would not presume he was not a resident of the district. The residence of George Safford, next friend, and not the residence of the infant Moore, represented by next friend, is the residence to be considered. George Safford, next friend, being possibly a resident of the District, and the removing defendant being incorporated under the laws of Kentucky, the Circuit Court of the United States had, in the opinion of the Circuit Court, unquestioned authority to hear and determine the cause. Exceptions were taken to the overruling of the two motions. On January 27, 1908, the petition for writ of mandamus was filed by plaintiff in the Supreme Court of the United States by leave, and on February 3, 1908, a rule to show cause was issued, returnable February 24, 1908. On application of respondent, with the consent of plaintiff, the return day was changed to March 9, 1908.

BRIEF.

I.

THE WRIT OF MANDAMUS.

Assuming that the determination of the Circuit Court that it had jurisdiction was erroneous, is such decision to be reviewed and reversed by mandamus?

The Act of September 4, 1789, Chapter 20, 1 Stat. 80, 4 Federal Statutes Annotated page 439, provides:

"The Supreme Court shall have power to issue * * * writs of mandamus in cases warranted by the principles and usages of law, to any courts appointed under authority of the United States." * * *

The Act of March 3, 1891, Chap. 517, 26 Stat. 826, section 5, as amended by Act of January 20, 1897, Chapter 68, provides, that appeals or writs of error may be taken from the District Courts or from the existing Circuit Courts direct to the Supreme Court in the following cases:

"In any case in which the jurisdiction of the court is in issue; in such cases the question of jurisdiction alone shall be certified to the Supreme Court from the court below for decision."

Mandamus will not serve as a writ of error to review an exercise of judicial discretion by the United States Circuit Court in determining that a cause should not

be remanded to the State court, unless the Circuit Court of the United States has abused its discretion.

In re Pollitz, 206 U. S. 323 (1906).
Ex parte Hoard, 105 U. S. 578.
Hannis Taylor's Jurisdiction and Procedure in the United States Supreme Court, sec. 316.

The Circuit Court in the case at bar held that a next friend appointed under the laws of Missouri had power to and did voluntarily appear in the United States Circuit Court. The decision of the Court that jurisdiction attached under such circumstances and in the light of decisions hereinafter referred to, was not an abuse of discretion.

The Judge of the Circuit Court for the Eastern Division of the Eastern District of Missouri, which is in the Eighth Circuit, did not abuse the judicial discretion which by law he had the right to exercise, when he determined that the privilege of having a determination of the controversy in the district of residence of the plaintiff was not, like diversity of citizenship, an indispensable pre-requisite to the jurisdiction of the court, but was a privilege which might be waived by plaintiff by entering a general appearance without objecting on that ground. For, on November 4, 1907, eight days prior to the overruling of the motion to remand in the case at bar, the United States Circuit Court of Appeals for the Eighth Circuit held, in a removal case removed on the ground of diverse citizenship in which neither party was a resident or citizen of the State or District in which the suit was brought, that the plaintiff's voluntary appearance operated as a waiver of his privilege to object on the ground that he was not a resident of the district.

Shanberg vs. Fidelity and Casualty Co., infra, as yet unreported. A certified copy of this opinion is filed herewith.

Certainly the Circuit Judge did not abuse judicial discretion when he adopted the construction of Ex parte Wisner, handed down by the Circuit Court of Appeals for the same circuit.

The Circuit Court of the United States is authorized and required by law—it has in other words, jurisdiction—to determine whether the cause placed under its control by removal proceedings shall continue under its control as a cause within the jurisdiction of the court to try, or whether the cause is one outside the jurisdiction of the court and one which must therefore be remanded to the State court for trial.

Where the remedy by writ of error exists, petitioner can not in good conscience claim that remedy to be inadequate and ask for the issuance of the extraordinary writ of mandamus, when petitioner has been at fault in appearing in the Circuit Court and in waiting nine months before filing his motion to remand, and by so doing has furnished reason for the court to determine it had jurisdiction.

In the Wisner case mandamus issued because it appeared that "absolutely no jurisdiction attached." In re Pollitz, 206 U. S. 331.

In the case at bar it was at least a debatable question whether jurisdiction attached. The court determined that it attached.

In In re Pollitz, 206 U. S., 331, the Court held:

"The application to this court is for the isuance of the writ of mandamus directing the Circuit Court to

reverse its decision although in its nature a judicial act and within the scope of its jurisdiction and discretion.

"But mandamus cannot be issued to compel the court below to decide a matter before it in a particular way or to review its judicial action had in the exercise of legitimate jurisdiction, nor can the writ be used to perform the office of an appeal or writ of error."

II.

JURISDICTION ATTACHED.

Where plaintiff and defendant are citizens of different States and are non-residents of the State and district in which a suit is brought in the State court and the amount involved is over $2,000, the jurisdiction of the United States Circuit Court attaches on removal thereto by defendant if a voluntary general appearance is made therein by plaintiff without objection by him that he is not a resident of the district.

Petitioner contends that the words,

"Where **jurisdiction is founded only on the fact that the action is between citizens of different States,** suit shall be brought only in the district of the residence of either the plaintiff or the defendant,"

in section one of the Act of 1887-1888, are a limitation on the fundamental power of the court, which prevents its trying a case brought in the United States Circuit Court when neither plaintiff nor defendant is a resident of the district, even though defendant voluntarily appears and makes no objection to jurisdiction on that ground.

Petitioner contends that in a cause removed to the United States Circuit Court on the ground of diverse

citizenship by a non-resident defendant, the foregoing clause prevents the court from trying the case, even though the non-resident plaintiff elects to and does submit himself to the jurisdiction of the court rather than cause the case to be remanded to the State court.

In short, petitioner contends that the foregoing clause is a limitation on the fundamental jurisdiction of the court and relies on Ex parte Wisner in support of his contention.

Respondent maintains the wording of the clause itself as well as a century's judicial construction of it and like clauses conclusively establish that it is a venue clause passed for the benefit of the parties, which, being for their benefit, may be waived by them. Respondent also relies on Ex parte Wisner and other cases in support of this position.

Under the Judiciary Act of 1887-88, in any diverse citizenship case brought in the Circuit Court of the United States, the process power of the Court is limited to cases in which either plaintiff or defendants resides within the district of the court. Defendant cannot be properly summoned into court unless plaintiff or defendant resides within the district. When both reside outside the district, and service is had on defendant, defendant may appear specially and object to the jurisdiction of the court, or may not appear at all; in either event the jurisdiction of the court will not attach. Defendant, however, may choose to voluntarily come in and, appearing generally, submit himself to the jurisdiction of the court, for the purpose of having a hearing and a determination of the matter in dispute. When defendant so submits himself, he waives his right to the benefit of the provision passed for his benefit requiring the suit to be brought in the district of residence of either the plaintiff or defendant, and jur-

isdiction attaches. The intention of Congress by the Act of 1887-88, was to restrict the jurisdiction in diverse citizenship cases brought in the United States Circuit Court or removed thereto, and it did restrict it by narrowing the venue to those cases in which plaintiff or defendant is a resident of the district. Nowhere, however, does it appear that Congress intended that the venue privilege so accorded a defendant of being sued in the district of residence of plaintiff or defendant might not be waived by him, or that such privilege would not be waived by a defendant voluntarily submitting himself to the jurisdiction of the court. While the process power of the court might not properly be exercised over a defendant when neither he nor plaintiff resided within the district, and the court for that reason could not acquire jurisdiction over him by process against him if he objected to it, or even if he failed to appear and made no objection, yet, if defendant voluntarily chooses to come in and does come into court and appears therein generally and submits himself to the jurisdiction of the court, jurisdiction of the court over him then attaches.

Under the Judiciary Act of 1887-88, in any case removed to the Circuit Court of the United States by a non-resident defendant on the ground of diverse citizenship, where plaintiff does not reside within the district, and plaintiff and defendant are residents and citizens of different States, plaintiff may either object to the jurisdiction of the Federal Court on the ground that he is not a resident of the district, or plaintiff may voluntarily choose to submit to the jurisdiction of the court over him rather than have a remanding of the cause to the State court. If he so voluntarily submits himself to the jurisdiction of the court without objection to the venue of the action, jurisdiction attaches.

Plaintiff cannot thereafter reconsider his choice and have the Circuit Court divested of the jurisdiction over him, which he by his voluntary action caused to attach.

In support of the foregoing, respondent respectfully submits the following brief of authorities:

The judicial power of the United States extends to controversies between citizens of different States.

> Constitution of the United States, Article III, Section 2.

This clause was intended to secure the citizen against local prejudice which might injure him if compelled to litigate his controversy with another in the tribunals of a State not his own. This object was the avowed purpose of the constitutional provision at the time of its adoption.

> Whelan vs. New York, etc., R. Co. (1888), 35 Fed. 858, 9 Fed. Statutes, Annotated p. 102, Gordon vs. Longest, 16 Peters 97.

By the Judiciary Act of September 24, 1789, c. 20, Section 11, 1 Stat. 78, the Circuit Court of the United States was given jurisdiction "concurrent with the courts of the several States of all suits of a civil nature at common law and in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars * * * and **the suit is between a citizen of the State where the suit was brought and a citizen of another State."** It further provided that "no civil suit shall be brought before either of said courts against an inhabitant of the United States by any original process in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving the writ."

Section 12, p. 79, provided that if "a suit be commenced in any State court * * * by a citizen of the State in which the suit is brought against a citizen of another State and the matter in dispute exceeds the aforesaid sum or value of five hundred dollars, exclusive of costs," on petition filed, etc., a removal can be effected.

In Pollard and Pickett vs. Dwight, et al. (1808), 4 Cranch 421, Dwight and others brought a foreign attachment against Pollard and Pickett, returnable to the County Court of Hartford, Connecticut. The defendants appeared and removed the action to the Circuit Court. Objection was made to the jurisdiction of the Circuit Court. Marshall, C. J., delivering the opinion of the court, held:

"The point of jurisdiction made by plaintiffs in error is considered as free from all doubt. By appearing to the action the defendants in the court below placed themselves precisely in the situation in which they would have stood had process been served upon them, and consequently waived all objections to the non-service of process. Were it otherwise, the duty of the Circuit Court would have been to remand the cause to the State court in which it was instituted, and this court would be bound now to direct that proceeding."

The leading case of Gracie vs. Palmer, 8 Wheat. 699 (1823), is reported as follows:

"**Mr. Webster** moved to dismiss the writ of error in this case for want of jurisdiction. He stated that the plaintiffs below were described to be aliens and subjects of the King of Great Britain, and the defendants Gracie and others to be citizens of the State of New York and the suit was brought in the Circuit Court of Pennsylvania. It did not appear that defendants were inhabitants of or found in the district of Pennsylvania at the time of serving the writ; and he therefore

contended under the 11th section of the Judiciary Act of 1789 c. 20, that no civil suit could be brought against them by original process in that district.

Mr. Chief Justice Marshall stated that the uniform construction under the clause of the act referred to had been that it was not necessary to aver on the record that the defendant was an inhabitant of the district or found therein; that it was sufficient if the Court appeared to have jurisdiction by citizenship or alienage of the parties. The exemption from being sued in a district in which the defendant was not an inhabitant or in which he was not found at the time of serving the process, was the privilege of the defendant which he might waive by a voluntary appearance."

In Toland vs. Sprague (1838), 12 Pet. 300, 327, plaintiff brought suit in the Circuit Court of the United States in Pennsylvania by a process known in Pennsylvania as a foreign attachment. Upon the return of the attachment executed on certain garnishees of defendant, the latter, by his attorney, obtained a rule to show cause why the attachment should not be quashed. which rule was afterwards discharged by the court, after which the defendant appeared and pleaded. Trial was had and a verdict and judgment were rendered in favor of defendant. Plaintiff was a citizen of Pennsylvania and defendant a citizen of Massachusetts but **domiciled** at the time of the institution of the suit without the limits of the United States, to-wit, at Gibraltar, and when the attachment was levied upon his property, was not found within the district of Pennsylvania. The court considered the question whether a foreign attachment could properly be used by the Circuit Court of the United States in cases where the defendant is domiciled abroad and is not found within the district in which the process issues so that it can be served upon him. Barbour, J., delivering the opinion of the court

and construing the eleventh section of the Judiciary Act, 1879, 1 Stat., page 78, held, page 329:

"We think the opinion of the Legislature is manifested to be that the process of a Circuit Court cannot be served without the District in which it is established without the special authority of law therefor * * * The next inquiry is whether, the process of attachment having issued improperly, there has anything been done which has cured the error? We think there is enough apparent on the record to produce that effect. It appears that the party appeared and pleaded to issue. Now, if the case were one of want of jurisdiction in the court, it would not, according to well-established principles, be competent for the parties by any act of theirs to give it, but that is not the case. The court had jurisdiction over the parties and the matter in dispute. The objection was that the party defendant, not being an inhabitant of Pennsylvania nor found therein, personal process could not reach him, and that the process of attachment could only be properly issued against a party under circumstances which subject him to process **in personam.** Now this was a personal privilege or exemption which it was competent for a party to waive. Pollard vs. Dwight, 4 Cranch, 421; Barry vs. Foyles, 1 Pet., 311."

In Ex parte Schollenberger (1877) 96 U. S. 369. Waite, C. J., held:

"The act of Congress prescribing the place where a person may be sued is not one affecting the general jurisdiction of the courts. It is rather in the nature of a personal exemption in favor of a defendant, and it is one which he may waive. If the citizenship of the parties is sufficient, a defendant may consent to be sued anywhere he pleases, and certainly jurisdiction will not be ousted because he has consented."

By Act of March 3, 1875, 18 Stat. 470, chapter 137. jurisdiction was given the Circuit Court "concurrent

with the courts of the several States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars * * * in which there shall be a controversy between citizens of different States," and provided:

"And no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant or in which he shall be found at the time of serving such process or commencing such proceeding."

Sec. 2 of the Act of 1875 provided "that in any suit of a civil nature at law or in equity now pending or hereafter brought in any State court where the matter in dispute exceeds, exclusive of costs, the sum or value of five hundred dollars and * * * in which there shall be a controversy between citizens of different States * * * either party may remove said suit into the Circuit Court of the United States for the proper district."

Claflin vs. Insurance Co. (1883), 110 U. S. 81, 88.

By Act of March 3, 1887, 24 Stat. c. 373, p. 552, as corrected by Act of August 13, 1888, 25 Stat., p. 433, chapter 366, Circuit Courts of the United States are given "original cognizance concurrent with the courts of the several States of all suits of a civil nature at common law or in equity where the matter in dispute exceeds, exclusive of interest and costs, the sum or value of two thousand dollars * * * in which there shall be a controversy between citizens of different States and in which the matter in dispute exceeds, exclusive of interest and costs, the sum or value afore-

said * * * Where the **jurisdiction** is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of residence of either the plaintiff or the defendant."

Section 2 of the Act of 1887-1888 provides: "* * * Any other suit (i. e., other than those arising under the Constitution, etc.) of a civil nature at law or in equity of which the Circuit Courts of the United States are given **jurisdiction** by the preceding section, and which are now pending or which may be hereafter brought in any State court, may be removed into the Circuit Court of the United States for the proper district by the defendant or defendants therein being non-residents of the State. * * *"

In First National Bank of Charlotte vs. Morgan (1889), 132 U. S. 141, suit was brought against the Bank in the Superior Court of Cleveland County, North Carolina. The Bank was a National Banking Association established at Charlotte, Mecklenburg County, in that State. Defendant filed an answer. Judgment was rendered for plaintiff, which judgment, being affirmed by the Supreme Court of North Carolina, was brought by writ of error to the Supreme Court of the United States. Objection to the jurisdiction of the Superior Court of Cleveland County, North Carolina, was made on the ground that the only court which consistently with the laws of the United States could take cognizance of this action was the one established in the county or city where the Bank was located.

Harlan, J., delivering the opinion of the court, page 145, held:

"This exemption of National Banking Associations from suits in State courts established elsewhere than in the county or city in which such associations were

located was, we do not doubt, prescribed **for the convenience of those institutions** and to prevent interruption in their business that might result from their books being sent to distant counties in obedience to process. * * * If the exemption had been claimed by the defendant when appearing in the Superior Court of Cleveland County, it must have been recognized. The defendant did not, however, choose to claim immunity from suit in that court. It made defense upon the merits, and, having been unsuccessful, prosecuted a writ of error to the Supreme Court of the State and in the latter tribunal for the first time claimed the immunity granted to it by Congress. This was too late. * * * We are of opinion that its exemption from suits in other courts in the same State was a personal privilege it could waive and which in this case the defendant did waive by appearing and making defense without claiming the immunity granted by Congress. No reason can be suggested why one court of a State rather than another, both being of the same dignity, should take cognizance of a suit against a National Bank, except the convenience of the bank. And this consideration supports the view that **the exemption** of a National Bank from suit except one in the county or city in which it is located, **is a personal privilege which it can claim or not as it deemed necessary."**

In McCormick Harvesting Machine Company vs. Walthers (decided March 3, 1890), 134 U. S. 41, Walthers, a citizen of Nebraska, brought suit July 21, 1887, in the United States Circuit Court for the District of Nebraska, against the McCormick Harvesting Machine Company, incorporated under the laws of Illinois, for maliciously and falsely suing out two attachments against him. Defendant answered but later obtained leave to withdraw its answer and filed a plea to the jurisdiction, alleging that it was not subject to be sued or to be summoned by original process in that district. The plea was overruled and trial was had, re-

sulting in verdict and judgment for plaintiff. A writ of error was sued out from the Supreme Court of the United States, which the defendant moved to dismiss, and united with that motion a motion to affirm. The motion to dismiss the writ of error was sustained.

Mr. Chief Justice Fuller, delivering the opinion of the court, says (p. 43):

"By section 1 of the act of March 3, 1887, 24 Stat. 552, c. 373, as corrected by the act of August 13, 1888, 25 Stat. 433, c. 866, to amend the act of March 3, 1875, determining the jurisdiction of the Circuit Courts of the United States and regulating the removal of causes from the State courts and for other purposes, it was provided: 'But no person shall be arrested in one district for trial in another in any civil action before a circuit or district court; and no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant, but where the jurisdiction is **founded** only **on the fact that the action is between citizens of different States,** suit shall be brought only in the district of the residence of either the plaintiff or the defendant.' The **jurisdiction common to all the Circuit Courts of the United States in respect to the subject matter of the suit and the character of the parties who might sustain suits in those courts is described in the section, while the foregoing clause relates to the district in which a suit may be originally brought.**"

In St. Louis, etc., Ry. vs. McBride (decided May 25, 1891), 141 U. S. 127, an action was commenced September 19, 1890, in the United States Circuit Court for the Western District of Arkansas. Defendant appeared and raised by demurrer not only the question of jurisdiction but also the question of the merits of the case. Plaintiff was a resident of the Western District of Arkansas and defendant was incorporated under the

laws of Missouri. Defendant demurred (1) because the court had no jurisdiction, and (2) because the complaint did not state facts sufficient to constitute a cause of action. By demurring to the complaint as not stating facts sufficient to constitute a cause of action even though in the same demurrer defendant objected to the jurisdiction, the Supreme Court held that defendant had appeared generally, even though there was no service of process on defendant, and also held defendant had waived his privilege to object to the venue (p. 130).

Defendant contended that the case was not one in which jurisdiction was founded only on the fact that the controversy was one between citizens of different States (in which case of course plaintiff, being a resident of the district and defendant being a citizen of another State, jurisdiction unquestionably existed), but that it came within the scope of the other section of the venue clause of the Act of 1887-88, providing that "no civil suit shall be brought before either of said courts, against any person by any original process or proceeding, in any other district than that whereof he is an inhabitant." Defendant was not an inhabitant of the Western District of Arkansas, where the suit was brought. Justice Brewer, speaking for the court, at page 131, says as to this contention:

"Assume that it is true as defendant alleges that this is not a case in which jurisdiction is founded only on the fact that the controversy is between citizens of different States, but that it comes within the scope of that other clause which provides that 'no civil suit shall be brought before either of said courts against any person by any original process or proceeding in any other district than that whereof he is an inhabitant,' **still the right to insist upon suit only in the one district is a**

personal privilege he may waive and he does waive it by pleading to the merits."

Justice Brewer cites ex parte Schollenberger, supra; Toland vs. Sprague, supra; Pollard vs. Dwight, supra, and Charlotte National Bank vs. Morgan, supra, in support of this principle.

In Shaw vs. Quincy Mining Company (decided 1892), 145 U. S. 444, a suit was brought in the United States Circuit Court for the Southern District of New York, by a citizen of Massachusetts against a corporation of Michigan. The Quincy Mining Company **appeared specially** and moved for an order to set aside the service. This order was granted. A petition for mandamus was applied for and a rule issued to show cause. The writ of mandamus was denied because neither party resided in the district and defendant made timely objection on that ground. Gray, J., delivering the opinion of the court, on page 453, however, employs this significant language:

"The Quincy Mining Company, a corporation of Michigan, having appeared specially for the purpose of taking the objection that it could not be sued in the Southern District of New York by a citizen of another State, there can be no question of waiver such as has been recognized where a defendant has appeared generally in a suit between citizens of different States brought in the wrong district. Gracie vs. Palmer, 8 Wheat. 699; St. Louis, etc., Ry. vs. McBride, 141 U. S. 127, 131, and cases cited."

This case is referred to at length in Ex parte Wisner 203 U. S. 449, so much relied on by petitioner. In both cases timely objection was made. In neither was there a voluntary appearance.

In Southern Pacific Company vs. Denton (1892), 146 U. S. 202, a suit was brought in the United States

Circuit Court for the Western District of Texas. Plaintiff was a resident of the Eastern District of Texas, and defendant was incorporated under the laws of Kentucky. **A demurrer was filed** by defendant **objecting to the jurisdiction** on the ground that neither party was a resident of the district. The court overruled the demurrer. Defendant excepted and then answered to the merits. A trial was had, resulting in a verdict and judgment for plaintiff. Defendant sued out a writ of error on the question of jurisdiction only. Plaintiff moved to dismiss the writ of error and to affirm the judgment. The judgment was reversed and the case remanded with directions to render judgment for defendant upon demurrer to the petition. On page 206, Justice Gray, however, says:

"It may be assumed that the exemption from being sued in any other district might be waived by the corporation by appearing generally or by answering to the merits of the action without first objecting to the jurisdiction. St. Louis & San Francisco R. Co. vs. McBride, 141 U. S., 127; Texas & Pacific Ry. vs. Cox, 145 U. S., 593."

In Empire Wire Company vs. Empire Mining Company, 150 U. S. 159, in which plaintiff and one defendant were both citizens of Kentucky, Justice Gray cited Shaw vs. Mining Company, supra, for the proposition that if parties are not citizens of different States, there is an entire want of jurisdiction which cannot be waived by the parties, which will be noticed by the court of its own motion (p. 163).

In Central Trust Company vs. McGeorge, 151 U. S. 129 (1894), the Central Trust Company, a corporation of New York, filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia, against the Virginia, Tennessee and Carolina

Steel and Iron Company of New Jersey. The whole question of exemption from being sued out of the District of its domicile is fully reviewed. Ex parte Schollenberger, St. Louis, etc., Ry. Co. vs. McBride; Shaw vs. Quincy Mining Company, and Southern Pacific Company vs. Denton, are considered and the court holds, Shiras, J., delivering the opinion of the court:

"Undoubtedly if the defendant company which was sued in another district than that in which it had its domicile had by a proper plea or motion sought to avail itself of the statutory exemption, the action of the court (in dismissing the complaint) would have been right. But the defendant company did not choose to plead that provision of the statute, but entered a general appearance and joined with the complainant in its prayer for the appointment of a receiver, and thus was brought within the ruling of this court, so frequently made, that the exemption from being sued out of the district of its domicile is a personal privilege which may be waived and which is waived by pleading to the merits."

In Martin's Administrator vs. Baltimore & Ohio Railroad Company, 151 U. S. 673 (1894), action was brought in a State court in which the action involved a controversy between citizens of different States. The petition for removal by defendant was not filed within the time required by the laws of the State or by rule of the State court to answer or plead to the declaration or complaint of the plaintiff. Objection was not made in the United States court that the petition was filed too late. Objection was made in the Supreme Court of the United States that the Circuit Court had no jurisdiction of the cause because the removal petition was filed too late. Justice Gray, page 688, held:

"The time of filing a petition for the removal of a case from a State court into the Circuit Court of the

United States for trial is **not** a fact in its nature **essential to the jurisdiction** of the national court under the Constitution of the United States, like the fundamental condition of a controversy between citizens of different States. **But the direction as to the time of filing the petition is more analogous to the direction that a civil suit within the original jurisdiction of the Circuit Court of the United States shall be brought in a certain district, a non-compliance with which is waived by a defendant who does not seasonably object that the suit is brought in the wrong district.** Gracie vs. Palmer, 8 Wheat. 699; Taylor vs. Longworth, 14 Pet. 172, 174; St. Louis & San Francisco Railway vs. McBride, 141 U. S., 127; Texas & Pacific Railway vs. Cox, 145 U. S., 593; Central Trust Co. vs. McGeorge, 151 U. S. 129."

The court held that the objection (to the exercise by the Circuit Court of the United States of jurisdiction over a case otherwise removable, upon the ground that the petition for removal was filed too late) is an objection which may be waived, and that it was waived in the case at bar by an appearance by plaintiff and by his failure to object seasonably.

In Mexican National Railroad Company vs. Davidson (1895), 157 U. S. 201, the Mexican National Construction Company, a citizen of Colorado, assigned certain causes of action against the Mexican National Railroad Company, also of Colorado, to Davidson, a citizen of New York, who on September 11, 1891, brought an action in attachment in the Supreme Court of the State of New York against the Railroad Company, which **removed** the case into the United States Circuit Court for the Eastern District of New York. Davidson, the plaintiff, recovered judgment, from which the Railroad Company sued out its writ of error to the Circuit Court of Appeals of the United States. The Circuit Court of Appeals certified to the Supreme

Court of the United States, among other questions, the question of the jurisdiction of the United States Circuit Court. The record showed that no question as to the jurisdiction of the Circuit Court was raised upon the trial. Chief Justice Fuller, page 207, delivering the opinion of the court, held that the action could not have originally been brought in the Circuit Court of the United States by Davidson, the assignee of the Colorado corporation, against a Colorado corporation, because both parties were in the eyes of the law citizens of the same State. On page 208 the court held that—

"the jurisdiction of Circuit Courts on removal is limited to such suits as might have been brought in that court by the plaintiff under the first section. The question is a question of jurisdiction as such and cannot be waived * * * **It is true that by the first section where the jurisdiction is founded on diversity of citizenship suit is to be brought 'only in the district of residence of the plaintiff or the defendant' and this restriction is a personal privilege of the defendant and may be waived by him. St. Louis & San Francisco Ry. vs. McBride, 141 U. S. 127. Section 2, however, refers to the first part of Section 1 by which jurisdiction is conferred, and not to the clause relating to the district in which suit may be brought. McCormick Machine Co. vs. Walthers, 134 U. S. 41.**"

In Interior Construction and Improvement Company vs. Gibney (1895), 160 U. S. 217, suit was brought, on June 9, 1890, on a bond, in the Circuit Court of the United States for the District of Indiana, by plaintiff company, incorporated under the laws of New Jersey. Defendants were citizens and residents of the State of Indiana. On June 19th defendants Gibney, McElwaine and Wheeler, by their attorney, entered a general appearance. Gibney never pleaded or answered. Defendant Bartley never appeared or made

any defense. On September 19, 1891, McElwaine and Wheeler pleaded in abatement that Gibney and Bartley were citizens of the State of Pennsylvania and that therefore the court had no jurisdiction. The plaintiff demurred to this plea and, electing to stand upon his demurrer to the plea, the court adjudged that the plaintiff take nothing by its action, and that the defendant recover costs. Justice Gray, delivering the opinion of the court, on page 219 said:

"Diversity of citizenship is a condition of jurisdiction, and when that does not appear upon the record the court of its own motion will order the action to be dismissed; but the provision as to the particular district in which the action shall be brought does not touch the general jurisdiction of the court over such a cause between such parties, but affects only the proceedings taken to bring the defendant within such jurisdiction and is a matter of personal privilege which the defendant may insist upon or may waive at his election, and the defendant's right to object that an action within the general jurisdiction of the court is brought in the wrong district is waived by entering a general appearance without taking the objection. Gracie vs. Palmer, 8 Wheat. 699; Toland vs. Sprague, 12 Pet. 300, 330; Ex parte Schollenberger, 96 U. S. 369, 378; St. Louis & S. F. Ry. vs. McBride, 141 U. S. 127; Southern Pacific Company vs. Denton, 146 U. S. 202, 206; Texas & Pacific Ry. vs. Saunders, 151 U. S. 105; Central Trust Company vs. McGeorge, 151 U. S. 129; Southern Express Company vs. Todd, 12 U. S. app. 351."

The court referred to the case of Smith vs. Lyon, 133 U. S. 315, and distinguished it, saying, page 220:

"But in the present case it is unnecessary to decide that question, because one of the principals and both sureties, being all of the defendants who pleaded to the jurisdiction, had entered **a general appearance long be-**

fore they took the objection that the sureties were citizens of another district. Defendants who have appeared generally in the action cannot even object that they were themselves inhabitants of another district, and of course cannot object that others of the defendants were such. Judgment reversed and case remanded with directions to sustain the demurrer to the plea."

In Cochran et al. vs. Montgomery County (1905), 199 U. S. 260, action was brought January 21, 1902, in the City Court of Montgomery, Alabama, by the County of Montgomery against John J. Cochran, a citizen of that County and State, and the Fidelity and Deposit Company of Maryland, a corporation of the State of Maryland. On February 15, 1902, the Fidelity and Deposit Company presented to the District Judge of the United States for the Middle District of Alabama holding the Circuit Court, its petition for the removal of the cause into the Circuit Court of the United States for that district, on the ground of diverse citizenship and on the further ground of local prejudice. The case came on to be heard in the Circuit Court at the May term, 1902, when the plaintiff moved to remand upon the ground that the Federal Court was without jurisdiction, one of the defendants being a citizen of the same State as the plaintiff. This motion was overruled. Judgment was had, which was reversed and a new trial ordered by the Court of Appeals. The second trial resulted in judgment for plaintiff, which was again reversed and a new trial ordered. The third trial resulted in judgment for plaintiff. Defendant sued out a writ of error in the Court of Appeals on the judgment so affirmed. The writ of error was allowed. Application for certiorari was also made. Chief Justice Fuller delivered the opinion of the court. Cause was ordered remanded to the Circuit Court with direction

to remand to the State Court because the requisite jurisdictional diversity of citizenship did not exist.

In Ex parte Wisner (1906), 203 U. S. 449, Wisner, a citizen of Michigan, commenced an action at law on February 17, 1906, in the Circuit Court of the City of St. Louis, Missouri, against John D. Beardsley, a citizen of the State of Louisiana. March 17th defendant filed his petition for removal, together with the bond required in such case. An order of removal was thereupon entered by the State court and transcript of record was filed in the Circuit Court of the United States. On March 19, 1906, plaintiff moved to remand on the ground that plaintiff was a citizen of Michigan and defendant a citizen of Louisiana and that the court therefore could not acquire jurisdiction. The motion was denied April 2, 1906, the court basing its opinion on Rome Petroleum Company vs. Hughes, 130 Fed. 585. April 23, 1906, leave was granted to file a petition for mandamus as well as petition for prohibition. Justice Fuller, delivering the opinion of the court, and apparently basing the opinion principally on the case of Shaw vs. Quincy Mining Company, 145 U. S. 444, 446, supra, awarded the mandamus. On pages 460 and 461, the court referred to the case of Central Trust Company vs. McGeorge, 151 U. S. 129, and St. Louis, etc., Ry. vs. McBride, 141 U. S. 127, and said, referring to the latter case, that "as the defendant appeared and pleaded to the merits, he thereby waived his right to challenge thereafter the jurisdiction of the court over him on the ground that the suit had been brought in the wrong district. **And there are many other cases to the same effect.**"

In the Wisner case, it is to be noted that the plaintiff, immediately after the filing of the transcript in the

Circuit Court of the United States, moved to remand, so that absolutely no jurisdiction attached.

In re Pollitz (1907), 206 U. S. 323, on page 331, Chief Justice Fuller, referring to the case of Ex parte Wisner, said that in the Wisner case the record showed that "absolutely no jurisdiction attached."

The question decided by the Wisner case was that the defendant, by removing the cause, did not procure the attaching jurisdiction of the United States Circuit Court over the plaintiff. The question was not presented whether jurisdiction attached by removal by defendant to the United States Circuit Court and by a general appearance of the plaintiff.

In Merchants' Heat and Light Co. vs. Clow (1906), 204 U. S. 286, plaintiff, an Illinois corporation, sued defendant, an Indiana corporation.

Defendant moved to quash the return of service, but was overruled. It excepted and then pleaded the general issue **and also a recoupment.**

The question was whether defendant, notwithstanding the motion to quash, by having filed the recoupment claim submitted to the jurisdiction of the court.

Justice Holmes, delivering the opinion of the court, held that by pleading the recoupment defendant made itself an actor and submitted itself to the jurisdiction of the court. By so appearing it waived its right to object.

In Corwin Mfg. Co. vs. Henrici Washer Co. (March 4, 1907), 151 Fed. 938, a removal case, Circuit Judge Lowell held a general appearance by plaintiff in the Circuit Court waived his privilege to object that he was not a resident of the district.

He reaches this result after a consideration of the Wisner case, the case of Central Trust Co. vs. McGeorge, and Martin vs. B. & O. R. R., 151 U. S. 673.

In Louisville and Nashville Railroad Company vs. Fisher, and Scott vs. Louisville and Nashville Railroad Company, reported in 155 Fed. Rep. Adv. Sheets, page 68, decided June 18, 1907, cases exactly in point and cases of removal from the State court, and cases construing Ex parte Wisner, 203 U. S. 449, Judge Lurton speaking for the United States Court of Appeals for the Sixth District, states the law as follows:

"The suits were not brought within either the district of plaintiff or that of defendant, and not being suits which might have been originally brought in the court to which they were removed, were not properly removable to that court from the State court. Ex parte Wisner, 203 U. S. 449. But the defendant corporations might and did waive any objection which they might have made to being sued in a district of which neither they nor the plaintiffs were inhabitants, by themselves removing the suits, and the plaintiffs submitted to the jurisdiction thus invoked, by failing to object in any way to such removal and by submitting to a trial on the merits. This consent by both parties to the jurisdiction takes the case outside the authority of Ex parte Wisner and brings it under Central Trust Co. vs. McGeorge, 151 U. S. 129, which is recognized in the former case (Ex parte Wisner) as an authority when both parties have submitted to a suit in the district of neither; federal jurisdiction otherwise appearing. Corwin Mfg. Co. vs. Henrici Washer Co., 151 Fed. 938."

In Mary Shanberg vs. Fidelity and Casualty Company of New York, decided Nov. 4, 1907, in the U. S. Circuit Court of Appeals for the Eighth Circuit, neither plaintiff nor defendant was, at the time the suit was brought and tried, a citizen of the State or district in which the suit was brought, the plaintiff in error being a citizen and resident of Kansas and the defendant in error being a citizen and resident of the State of New

York. The cause was originally brought in the State court and was removed by the defendant to the Circuit Court of the United States for the Western District of Missouri. Plaintiff contended that the jurisdiction of the United States Circuit Court did not attach, even though the plaintiff had voluntarily appeared therein. Respondent asks the court to especially note this case, inasmuch as it is a case determined by the Court of Appeals of the respondent's circuit and was determined just eight days before respondent reached the same conclusion when he overruled the petitioner's motion to remand.

This opinion is not yet officially reported; a certified copy of it, however, is filed herewith. The Court says:

"The question of jurisdiction was not raised in the court below. No objection whatever to its jurisdiction was made in that court; plaintiff voluntarily appeared, **filed a reply** and proceeded in the trial without objection, the question of jurisdiction being now raised for the first time, in the brief of plaintiff in error filed in this court. It is insisted that the case of Ex parte Wisner, 203 U. S. 499, is controlling in this case and fully sustains the contention of the plaintiff. It must be conceded that there is a statement found in the opinion of the court in that case which tends to give color to this contention, but to determine what was really decided, we must look at the case then before the court. In that case, Wisner, a citizen of the State of Michigan, commenced an action on the State Court in the State of Missouri against Beardsley, a citizen of the State of Louisiana. Beardsley filed his petition to remove the case from the State Court into the Court of the United States for the Eastern Division of the Eastern District of Missouri, on the ground of diversity of citizenship, together with the bond required in such cases; an order of removal was thereupon entered by the State Court and a transcript of the record was filed in the Circuit Court. Wisner moved to re-

mand on the ground that the Circuit Court had not acquired jurisdiction by the removal. The motion was heard and denied. Wisner then applied to the Supreme Court for leave to file a petition for mandamus which was granted and rules entered returnable upon a day fixed and the case submitted on the returns to the rules. The Supreme Court held that the motion to remand to the State Court should have been sustained on the ground that the Circuit Court had no jurisdiction to proceed. It will thus be seen that the Wisner case differs materially from the case at bar in that, in that case the plaintiff took advantage of the first opportunity to raise the question of jurisdiction by presenting his motion to remand upon that ground; whereas, in this case, the plaintiff not only failed to ask that the case be remanded, but voluntarily filed her reply and proceeded to trial, thus bringing the case more nearly within the principle announced by the Supreme Court in the case of Central Trust Company vs. McGeorge, 151 U. S. 129. In the case last cited, the Central Trust Company, a corporation created by and existing under the laws of the State of New York, filed a bill in equity in the Circuit Court of the United States for the Western District of Virginia against the Virginia, Tennessee and Carolina Steel and Iron Company, a corporation created by and existing under the laws of the State of New Jersey. The defendant company entered a general appearance, and joined with the complainant in its prayer for the appointment of a receiver without objection to the jurisdiction. Thereafter the Circuit Court dismissed the bill on the ground that under the Act of 1887, as amended by the Act of 1888, it was without jurisdiction of the cause. The Supreme Court reversed the decree dismissing the bill; holding that exemptions from being sued out of the District of its domicile is a privilege which a corporation may waive, and which is waived by pleading to the merits; and further that the fact that neither the plaintiff nor the defendant resides in the district in which the suit is brought, does not prevent the operation of the waiver. See also Ex parte Schollenberger, 96 U.

S. 369; Bank vs. Morgan, 132 U. S. 141; St. Louis and San Francisco Railway Company vs. McBride, 141 U. S. 127; Southern Express Company vs. Todd, 56 Fed. 104; Memphis Savings Bank et al. vs. Houchens, 52 C. C. A. 176; and cases cited in note on p. 192; Shaw vs. Quincy Mining Company, 141 U. S. 444; Southern Pacific Railway Company vs. Denton, 146 U. S. 202."

In the case of McPhee and McGinnity Company vs. Union Pacific Railroad Company, decided by the U. S. Court of Appeals for the Eighth Circuit, November 27, 1907, suit was originally brought in the United States Circuit Court. This opinion is not officially reported; a certified copy thereof is filed herewith. Defendant, without appearing especially, interposed a demurrer to the bill. Defendant later raised the question of the jurisdiction of the court on the ground that neither he nor the plaintiff resided within the district. The court, Justice Sanborn delivering the opinion, says:

"Counsel for the respondents first contend that the court below was without jurisdiction of the case of McPhee & McGinnity Company because that Company was a corporation of the State of Nevada, and the Union Pacific Railroad Company was a corporation of the State of Utah, so that the suit was not brought in the district of the residence of the plaintiff or of all the defendants (1 U. S. Comp. Stats. 508), and they cite Greeley vs. Lowe, 155 U. S. 58, 68, and Ex parte Wisner, 203 U. S. 449, in support of their position, but the diversity of citizenship and the amount in controversy conferred jurisdiction upon the court below, subject to the right of the respondents to a determination of their controversy in the district of the residence of the plaintiff or of the defendants. **This right, however, was not, like diversity of citizenship, an indispensable pre-requisite to the jurisdiction of the court, but a mere personal privilege which they might waive, and which by interposing general demurrers to the bill, which**

were sustained before they suggested this objection, they did waive. Texas & Pacific Ry. Co. vs. Cox, 145 U. S. 593; Martin vs. B. & O. R. R. Co., 151 U. S. 673, 678; Interior Cons. & Impt. Co. vs. Gibney, 160 U. S. 217, 219; Toland vs. Sprague, 12 Peters, 300, 330; ex parte Schollenberger, 96 U. S. 369, 378; Charlotte National Bank vs. Morgan, 132 U. S. 141, 145; St. L. & S. F. Ry. Co. vs. McBride, 141 U. S. 127, 130; Southern Express Co. vs. Todd, 5 C. C. A. 432, 437, 56 Fed., 104, 109; Van Doren vs. Pennsylvania R. Co., 35 C. C. A., 282, 93 Fed. 260; Hoover & Allen Co. vs. Columbia Straw Paper Co., 68 Fed. 945; Scott vs. Hoover, 99 Fed. 247, 249; Platt vs. Massachusetts Real Estate Co., 103 Fed. 705, 706; U. S. Fidelity & Guaranty Co. vs. Board of Comm'rs, 76 C. C. A. 114, 116, 145 Fed. 144, 146; Shanberg vs. Fidelity & Casualty Co. —— C. C. A. —— Fed. ——, filed Nov. 4, 1907."

In Logan vs. Postal Telegraph & Cable Co., 157 Federal Reporter (advance sheets), page 570, a case brought in the United States Circuit Court, decided January 2, 1908, District Judge Trieber says:

"Before passing upon the demurrer of the defendant telegraph company, a matter of practice should first be disposed of. The complainants are citizens of Illinois, and the defendant a corporation existing under the laws of the State of Texas, but having an agent designated for service of legal process in this district. As Judiciary Act Aug. 13, 1888, c. 866, sec. 1, 25 Stat. 433 [U. S. Comp. St. 1901, p. 508], provides that in actions arising under the Constitution or laws of the United States, no civil suit shall be brought against any person by original process in any other district than that whereof he is an inhabitant, and when the jurisdiction is founded on the fact that there is a diversity of citizenship it shall be brought only in the district of the residence of either the plaintiff or defendant, an objection on the part of this defendant to the jurisdiction of the court would have been fatal. But defendant entered its appearance generally, and filed a general de-

murrer to the sufficiency of the bill, making no objection to being sued in a district of which it is not an inhabitant. After the close of the argument, it having been indicated by the court that the demurrer of the other defendants to the jurisdiction would probably be sustained, this defendant, without leave of the court, filed a paper with the clerk suggesting that the court was without jurisdiction, as neither the plaintiffs nor it were residents of this district. If residence in the district was jurisdictional, it would, of course, be immaterial when the question of jurisdiction was raised, or whether raised at all, for by Judiciary Act of March 3, 1875, c. 137, sec. 5, 18 Stat. 472 [U. S. Comp. St. 1901, p. 511], which is retained by section 6 of the act of 1888, it is made the duty of the court at any stage of the proceedings, when it shall appear to the court that it is without jurisdiction, to dismiss it. But are the foregoing provisions relating to the residence of the parties, if the necessary diversity of citizenship exists or there is a federal question involved, jurisdictional, which may not be waived?

"In Ex parte Wisner, 203 U. S. 449, 27 Sup. Ct. 150, 51 L. Ed. 264, there is an expression by the court which would indicate that such is the case; but this was clearly obiter, as that question was neither before the court nor necessary for the determination of the issue involved in that suit. In Central Trust Co. vs. McGeorge, 151 U. S. 129, 14 Sup. Ct. 286, 38 L. Ed. 98, which was instituted when the act of 1888 was in force, the identical question was before the court, and it was held that the right to be sued in the district of the residence of either of the parties was merely a privilege, which could be waived and which is waived by pleading to the merits; and the fact that neither plaintiff nor defendant resides in the district in which the suit is brought does not prevent the operation of the waiver. To the same effect are Railway Co. vs. McBride, 141 U. S. 127, 11 Sup. Ct. 982, 35 L. Ed. 659, and Railway Co. vs. Cox, 145 U. S. 593, 12 Sup. Ct. 905, 36 L. Ed. 829.

"The courts have not been harmonious as to the effect

of the dictum in Ex parte Wisner; the United States Circuit Court of Appeals for the Ninth Circuit holding that its effect is to make the residence of one of the parties to the action in the district jurisdictional, of which the court is bound to take notice, even without objection being made by either party (Yellow Aster, etc., Mining Co. vs. Crane Co., 150 Fed. 580, 80 C. C. A. 566), while the United States Circuit Courts of Appeals for the Sixth and Eighth Circuits have followed the rule laid down in Central Trust Co. vs. McGeorge, those courts in effect holding that that part of the opinion in Ex parte Wisner was obiter and not controlling (L. & N. R. R. vs. Fisher [C. C. A.] 155 Fed. 68; McPhee & McGinnity Co. vs. Union Pac. R. R. [Nov. 27, 1907, 8th Circuit; C. C. A.] 157 Fed. ——; Shanberg vs. Fidelity & Casualty Co. [decided Nov. 4, 1907, 8th Circuit; C. C. A.] 157 Fed. ——; Corwin Mfg. Co. vs. Henrici Washer Co. [C. C.] 151 Fed. 938). As, in the absence of an authoritative decision of the Supreme Court, that of the Circuit Court of Appeals for the Eighth Circuit is conclusive on this court, it follows that it must be held that the filing of the general demurrer by the telegraph company was a waiver of its exemption to be sued in this district, and its paper or motion will be stricken from the files."

In the Matter of Francis S. Reisenberg, 208 U. S. 90, No. 6 Advance Sheets of Opinions of United States Supreme Court of October Term, 1907, page 219, 223, decided January 13, 1908, the Court says, Mr. Justice Peckham delivering the opinion:

"The statutes defining the jurisdiction of the Circuit Court (Act of March 3, 1875, Chapter 137, Section 1; 18 Stat. at L. 470; Act March 3rd, 1887, Chap. 373, Section 1, 24 Stat. at Large, 552; Act August 13, 1888, Chap. 866, Section 1, 25 Stat. at L., 433, U. S. Comp. Stat. 1901, page 507, 508) confer it among other cases where 'there shall be a controversy between citizens of different States in which the matter

exceeds, exclusive of interest and costs, the sum or value aforesaid' ($2,000.00)."

In addition to the foregoing, respondent asks the Court to note the great array of authorities to the same effect collected in Vol. 4 Federal Statutes, Annotated, pp. 317, 305).

The late Judge Amos M. Thayer, in his Jurisdiction of Federal Courts, page 26, section 36, says:

"Waiver of Right to Be Sued in District of Residence—Removal: It has been stated heretofore (ante Sec. 20), that if a case is one of federal cognizance, because of diverse citizenship, or because it involves a federal question, the right of the defendant to be sued in a particular district may be waived by him and is waived by entering a general appearance to the suit. In like manner a plaintiff may waive his right to have a suit tried in the district where the plaintiff or the defendant resides. Thus, where the plaintiff and the defendant to a suit were non-residents of the State and district in which a suit had been brought in the State court, it was held that the defendant could remove the case to the Circuit Court of the United States for that district. Kansas City & T. R. R. Co. vs. Interstate Lumber Co., 37 Fed. Rep. 3. The acts of Congress prescribing the place where a person may be sued are not laws which affect the general jurisdiction of the federal courts. They are laws which confer on the defendant the right to be sued in a certain district, which privilege he may waive if he elects to do so. If the parties are citizens of different States, the defendant may consent to be sued where he pleases. Ex parte Schollenberger, 96 U. S. 369; Sales vs. Insurance Co., 2 Curtis, 212; Bushnell vs. Kennedy, 9 Wall, 387; Claflin vs. Commonwealth Insurance Co., 110 U. S. 81."

Moon on Removal of Causes, who contends that the jurisdiction of the Federal Courts should be strictly construed, nevertheless on page 108, section 65, says:

"A suit against a non-resident may be removed from a State court to the United States Circuit Court for the district in which the suit is pending, though the venue of an original action in the United States Circuit Court would not be in such district. The clause of the removal act now under consideration refers to **jurisdiction** as such, and not to the **venue** of actions."

Citing in support thereof Mexican National Railroad Company vs. Davidson, 157 U. S. 201.

See also to same effect as the foregoing authorities Rose on Federal Procedure. The author considers the venue clause in question under a special chapter entitled "Venue," and states, Section 401f, p. 503, that the provision as to place is not jurisdictional.

See also to same effect Desty on Federal Procedure, Section 26, p. 154.

Jurisdiction of the person is acquired either by service of process within the territorial limits of the jurisdiction upon defendant personally or by his voluntary appearance either in person or by attorney.

17 Enc. of Law, 2nd Edition, p. 1064.

Browne on Jurisdiction, Section 49, says:

"A defendant who resides out of the jurisdiction of the court may appear and waive the jurisdiction or rather the personal right he may have arising from that circumstance."

It would seem therefore that adults can waive the benefit of the venue clause and that when they do jurisdiction attaches.

III.

A NEXT FRIEND MAY WAIVE.

A next friend of Missouri, appointed under the laws of Missouri to institute and prosecute a suit for an infant of Illinois against a defendant of Kentucky, can, on removal of the suit to the Circuit Court of the United States by the non-resident defendant on the ground of diverse citizenship, elect to submit to the jurisdiction of the Circuit Court of the United States or to have the cause remanded to the State court on the ground that the infant is not a resident of the district.

As the plaintiff chose to and did submit to the jurisdiction of the court, and as the jurisdiction of the court thereby attached, the next friend cannot thereafter reconsider his choice and have the court divested of its jurisdiction by his motion to remand the cause to the State court.

Petitioner contends then that (admitting the clause under discussion is a venue clause and that the privilege of a trial in a certain district could be waived by an adult plaintiff by a general appearance) still a next friend can not elect to submit to the jurisdiction of the Circuit Court of the United States on removal, but has power only to move for a remanding to the State court; that the next friend has not, in other words, power to file in the Circuit Court of the United States an amended petition setting out grounds of negligence in addition to those set out in the petition filed in the State court or to stipulate that the cause be continued.

Respondent holds the next friend (if the infant is the plaintiff and person whose residence is to be considered) has power to make this election for the infant.

Respondent also holds that as hereinafter set out the next friend is the plaintiff and his residence is the residence to be considered.

Revised Statutes of Missouri, 1899, provide:

Section 550. Suits by infants may be commenced and prosecuted either, first, by a guardian or curator of such infant; or, second, by a next friend appointed for him in such suit.

Sec. 551. The appointment of a next friend for an infant shall be made by the court in which the suit is intended to be brought or by a judge or clerk thereof.

Sec. 552. Such appointment should be made on the petition in writing of such infant if of the age of 14 years, and the written consent of the person proposed to be next friend to such infant acknowledged before or proved to the court or officer making the appointment.

Sec. 554. Before any person shall be appointed a next friend for an infant in any suit to recover any personal property, debt or damages, he shall, if required by the court or officer to whom application for such appointment shall be made, execute a bond to such infant in double the amount claimed in such suit, with such securities as shall be provided by the court or officer, conditioned that such next friend shall account to such infant for all money, or property which may be recovered in such suit.

Sec. 556. The petition for the appointment of the next friend and the written consent of the person proposed to be next friend and the order of appointment shall be filed in the office of the clerk of the court where the suit is proposed to be brought before any proceedings shall be had in the cause.

Sec. 557. The guardian or next friend of any infant who commences or prosecutes a suit shall be responsible for

the costs thereof, unless such infant be permitted by the court to sue as a poor person as provided by law.

An infant is not bound by a contract for legal services made on his behalf by his guardian or next friend. The next friend is liable for the attorney's fees.

Dillon vs. Bowles, 77 Mo. 603.

Removal transfers the hearing from a State to a national tribunal.

Moon on Removal of Causes, Section 70, p. 118.

A removal of a cause from a State court to a Circuit Court of the United States changes the place of trial. **It is a change of venue.**

Moon on Removal of Causes, Section 205, p. 640.

In Raming vs. Metropolitan St. Ry., 157 Mo. 477, 514 (1900), a case in which it was questioned whether a Missouri next friend could make an affidavit for a change of venue to another State court was considered. The next friend in the affidavit referred to himself as plaintiff.

The court says, p. 514:

"Section 2261, Revised Statutes 1889, requires the application and affidavits for a change of venue to be made by the party, and it has been held that this means the party in his own person and not by agent or attorney. (88 Mo. 226.) But it has never been decided in case of an infant suing by his next friend that the application can not be made by the next friend.

"A next friend is neither the agent nor attorney for his ward. An agent or attorney derives his authority as such from his principal, but an infant cannot appoint an agent and empower him to do an act which in contemplation

of law he is himself incapable of doing. The next friend does not derive his authority from the infant, and his office does not rest on such authority, either express or implied.

"It is because the law regards an infant incapable of conducting a law suit in his own behalf that it has made provisions for the appointment of a next friend to act for him. The next friend derives his authority from the court which appoints him and as he is appointed to institute and conduct the suit it follows that he has authority to do every act which the interest of the infant demands and the law authorizes. If this statute is to be considered so strictly as to deny the next friend the authority to make an application for a change of venue, then we necessarily deny to infants who are unable to act for themselves the equal protection with other litigants that the statute was designed to afford. Not only would this be a rank injustice to a class for whose interests the law has always been watchful, but it would raise a serious question as to the validity of the statute itself. * * * It is intended here to say that in the suit of an infant by his next friend the next friend is the proper person to make the application for a change of venue."

The change of venue so made was upheld.

In Kingsbury vs. Buckner, 134 U. S., 650 (in a case originally brought in an Illinois court, in which State, appeals and writs of error may be taken to the Supreme Court of Illinois, held in the grand division in which the case was decided or by **consent** of the parties to any other grand division) it was held that a guardian *ad litem*, or next friend of an infant, may consent that the case, in which the infant is a party, be heard in some other grand division of the Supreme Court of Illinois than the division in which it was decided, or at a term

of the Supreme Court earlier than such appeal or writ of error would be ordinarily heard, and may waive the execution of an appeal bond by the opposite party, an appeal bond not being essential to the jurisdiction of the Supreme Court.

The court Justice Harlan, delivering the opinion on p. 680, said: "The court whose duty it is to protect the interests of the infant should see to it that they are not bargained away by those assuming or appointed to represent them. But this rule does not prevent a guardian *ad litem* or *prochein amy* from assenting to such arrangements as will facilitate the determination of the case in which the rights of the infant are involved. * * * **A consent by the next friend or guardian ad litem that a case be heard in a particular division could not possibly prejudice the substantial rights of the infant."**

In the same case, the guardian ad litem waived the benefit of a ten days' notice given by the statute in such cases to take a deposition. It was contended that such guardian could not make such waiver. The court, however, on page 686, held, "The statutory provision requiring ten days' notice for the suing out of a commission to take depositions is **one for the benefit of the party against whom the depositions are to be read and might be waived."**

Under the authority of Raming vs. Metropolitan Ry. (*supra*) a next friend can take a change of venue from one State court to another.

A guardian *ad litem* for an infant defendant has power as evidenced by many decisions to elect to change the place of trial by a removal from a State to a Federal court.

The same next friend has filed an application for a mandamus, to compel a remanding of the cause to the State court, who elected by filing the amended petition in the Circuit Court to have the cause tried in the United States Court rather than in the State court.

Suppose this court grants the application for the writ on the ground that petitioner had no authority to file the amended petition in the Circuit Court of the United States. Who shall say that the next friend will not, when the cause is ordered remanded to the State court, appear before this court and file another application for mandamus to compel the Circuit Court of the United States to **assume** jurisdiction on the ground that petitioner had no power to make the present application?

It is submitted that the reason why petitioner has not power to elect whether to have the cause tried in State or Federal court is involved equally in both instances.

In both instances the claim of lack of authority seems to be without weight.

Because the infant cannot commence and prosecute the suit a next friend who can is appointed. Involved many times in the prosecution of a suit is an election or choice of alternatives. That choice when fairly made is within the power—the necessary power—of the next friend to make. He is bound to make it. He cannot do otherwise and proceed with the case.

There is nothing here to warrant a conclusion that the choice of the Federal forum as the place to try the cause was not fairly made.

The next friend was presented with the question, "Shall I cause this case to be sent back to the State court as I am privileged to do, or shall I not, and have the cause tried in the United States Court." He determined on one alternative as advisable under the circumstances. This decision made, it is submitted it should be held to be finally made.

The next friend had capacity to and did waive the privilege he had to object because the infant was not a resident of the District.

IV.

STATUS OF NEXT FRIEND.

The next friend is the party whose residence under the venue clause is to be considered. George Safford, the next friend, is alleged to be a citizen and resident of Missouri. There was no showing made that he was not a resident of the district. He being a citizen of Missouri and possibly a resident of the District, and the removing defendant being a non-resident corporation of Kentucky, jurisdiction on petitioner's main contention unquestionably exists.

Revised Statutes of Missouri, 1899, provide: Section 539.—There shall be in this State but one form of action for the enforcement or protection of private rights, and redress or prevention of private wrongs, which shall be denominated a civil action; and the party thereto complaining shall be known as the plaintiff, and the adverse party as the defendant.

Section 540.—Every action shall be prosecuted in the name of the real party in interest except as otherwise provided in the next suggested section. * * *

Section 541.—An executor or administrator, **a trustee of an express trust** or **a person expressly authorized by statute,** may sue in his own name without joining with him the person for whose benefit the suit is prosecuted. The trustee of an express trust within the meaning of this section shall be construed to include a person with whom or in whose name a contract is made for the benefit of another.

In Mexican Central District Court vs. Eckman, 187 vs. 429, suit was brought in the U. S. Circuit Court for the Western District of Texas by Eckman, a citizen and

resident of that district, as guardian of Alfonso Huesselman a minor, a citizen and resident of Illinois, against the Mexican Central Railway Company, a corporation of Massachusetts, to recover damages for injuries sustained in Mexico through the negligence of the company in whose employ he then was. Chief Justice Fuller delivering the opinion of the Court, on p. 433, says:

"It is true that where a State or one of its officials is a mere figurehead, a nominal party, to a suit on a sheriff's or administrator's bond, or an action is instituted in the name of a United States marshal on an attachment bond, the real party in interest is taken into account on the question of citizenship, notwithstanding the general rule that the jurisdiction of the Federal court depends, not on the relative situation of the parties concerned in interest, but on the relative situation of the parties named in the record. But those are instances of merely formal parties whose names are used from necessity and, as said in New Orleans v. Gaines' Administrator, by Mr. Justice Bradley, "we have repeatedly held that representatives may stand upon their own citizenship in the Federal courts irrespectively of the citizenship of the persons whom they represent—such as executors, administrators, guardians, trustees, receivers, etc. The evil which the law was intended to obviate was the voluntary creation of Federal jurisdiction by simulated assignments. **But assignments by operation of the law creating legal representatives are not within the mischief or reason of the law.**

If in the State of the forum the general guardian has the right to bring suit in his own name as such as guardian and does so, he is to be treated as the party plaintiff so far as Federal jurisdiction is con-

cerned, even though suit might have been instituted in the name of the ward by guardian ad litem or next friend. He is liable for costs in the event of failure to recover and for attorney's fees to those he employs to bring the suit and in the event of success the amount recovered must be held for disposal according to law, and if he does not pay the same over to the parties entitled, he would be liable therefor on his official bond.

In the case at bar under Section 541 of Revised States of Missouri, 1899 (*supra*), suit may be instituted in the name of the next friend; under Section 557, Revised Statutes of Missouri, 1899 (*supra*), the next friend is liable for costs; under the authority of Dillon v. Bowles, 77 Mo. 603, the next friend is liable for attorney's fees; under Section 554, Revised Statutes of Missouri, 1899 (*supra*), the next friend is liable under his bond required in such cases.

As stated in Raming vs. Metropolitan St. Ry., 157 Mo. 477, 514, "a next friend is not the agent or attorney of his ward. The next friend does not derive his authority from the infant and his office does not rest on such authority either express or implied. It is because the law regards an infant incapable of conducting a law suit in his own behalf that it has made provisions for the appointment of a next friend to act for him."

The next friend stands, it is submitted, as the responsible person involved in the commencement and prosecution of the suit, and he rather than the infant is the one whose residence should be considered.

All of which is respectfully submitted.

P. TAYLOR BRYAN,
HARVEY L. CHRISTIE,
HAROLD R. SMALL,
Counsel for Respondent.